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In The

Supreme Court of the United States

October Term, 1991

KENDALL STOUT,

Petitioner,

v.

BORG-WARNER CORPORATION, ET AL.,

Defendants,

FAIRCHILD-HILLER STRATOS DIVISION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit Court of Appeals erred in substituting mere "government review" for "government discretion" in determining whether the initial element of the government contractor defense has been established, thereby conflicting with this Court's opinion in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 101 L.Ed.2d 442, 108 S.Ct. 2510 (1988) and the Fifth Circuit's own opinion in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), and further constituting a tacit adoption of *Trevino's* dissent.

2. Whether the Fifth Circuit Court of Appeals erred in implying that a failure to warn claim cannot exist independently of a design claim, thereby conflicting with *Boyle v. United Technologies Corp.*, 487 U.S. 500, 101 L.Ed.2d 442, 108 S.Ct. 2510 (1988) and the Second Circuit's opinion in *In Re Joint Eastern & Southern District New York Asbestos Litigation*, 897 F.2d 626 (2d Cir. 1990).

3. Whether the Fifth Circuit Court of Appeals erred in holding that Fairchild's warnings were sufficient to apprise the government of the risks involved in servicing its unit, and that the dangers involved were so obvious as to relieve Fairchild of its duty to warn.

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PETITION FOR WRIT OF CERTIORARI

Kendall Stout, Petitioner, respectfully requests that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, reversing that court's decision which affirmed a grant of summary judgment based upon the government contractor defense, and remanding this case to the district court for trial on the merits.

OPINION BELOW

The opinion of the court of appeals is a formal opinion, but has not yet been published. A copy is reprinted in the appendix to this petition.

STATEMENT OF JURISDICTIONAL GROUNDS

The court of appeals issued its opinion on June 17, 1991, and denied Petitioner's Suggestion for Rehearing *En Banc* on July 15, 1991, treating it as a petition for panel rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254. This petition will be timely filed if presented on or before October 14, 1991.

STATEMENT OF THE CASE

1. Course of proceedings and disposition of the case.

Plaintiff Kendall Stout originally filed this case June 16, 1987 in the United States District Court for the Western District of Texas, El Paso Division, Chief Judge Lucius D. Bunton III presiding, pursuant to diversity jurisdiction. (R. I at 228-233). It is a products liability case, and originally included numerous defendants. Following discovery, the only remaining defendant was Fairchild-Hiller Stratos Division of Fairchild Industries, Inc. ("Fairchild"). (R. I at 38, 146-148, 149-154).

By motion for summary judgment, Respondent Fairchild asserted the military contractor defense set forth by the U.S. Supreme Court in *Boyle v. United Technologies,*

Inc., 487 U.S. 500, 101 L.Ed.2d 442, 108 S.Ct. 2510 (1988). (R. I at 43-47, 52-100, 110-145). Petitioner filed his response with controverting affidavit. (R. I at 25-32, 35-37, 48-49).

The district court entered summary judgment in favor of Respondent, based upon the military contractor defense, on April 9, 1990. (R. I at 15-24). Petitioner, after filing his motion for new trial, appealed from that summary judgment. (R. I at 2-3, 4, 11-14).

A panel of the U.S. Court of Appeals for the Fifth Circuit affirmed the summary judgment of the district court by formal opinion issued June 17, 1991. *Stout v. Borg-Warner Corp.*, No. 90-8294 (5th Cir. June 17, 1991). Petitioner filed a Suggestion for Rehearing *en banc* on June 26, 1991. Treating the suggestion as a motion for panel rehearing, the court of appeals denied it on July 15, 1991.

2. Statement of facts.

Petitioner Kendall Stout was egregiously injured while repairing an air conditioning unit designed and manufactured by Respondent Fairchild, attached to a Hawk Missile System Mobile Repair Unit ("Hawk Shop" or "unit"). While pulling his hand out of the unit, it was sucked up into the rotating fan. He lost all four fingers and half the thumb of his right hand, and was hospitalized for four months. (R. II, Stout Depo. at 14-15, 54). The facts relevant to this petition concern the development of the air conditioning unit and its fan.

The Army undertook to redesign the Hawk Shop's predecessor, the VEA4-3, in the early 1960's. The newly designed unit is the VEA4-3A. (R. I at 111, 119-129; R. II, Buckingham Depo. at 14). Respondent Fairchild (which had designed the original) also received the design contract for the new unit. (R. I at 117-118; R. II, Buckingham Depo. at 14).

The Army provided specifications for the air conditioning unit including the following fan specifications:

> 3.12. *Air-handling components.* All air fans shall be of the continuous-duty type, statically and dynamically balanced.
>
> 3.13. *Fan motors.* The evaporator and condenser fan motors shall be of continuous-duty type, totally enclosed, and fungus-proofed and shall be equipped with permanently lubricated ball bearings. The motors shall be equipped with thermal overload protectors sized to prevent motor operation above the safe operating temperature for which the motor is rated. (R. I at 121).

The unit's specifications included military and federal publications, but also relied upon those promulgated by the National Bureau of Standards, the Air Moving and Conditioning Association, the American Standards Association, and the National Electrical Manufacturers Association, all of which are private industrial organizations. (R. I at 64, 119-129). No specifications for safety features were made at all: the government required only a 38,000 BTU base-mounted, self-contained, light weight air conditioner. (R. I at 121).

Although the Army ultimately sanctioned Fairchild's design, the contractor, not the military, was wholly responsible for designing the unit, manufacturing it, and drafting its entire technical operating manual (R. I at 55-56; R. II, Buckingham Depo. at 20-21). Fairchild prepared a preliminary design which was approved with slight modifications by the Army. (R. II, Buckingham Depo. at 15). Fairchild then prepared a detailed design which in turn was evaluated and approved by the Army. (R. I at 55-56, 113-14; R. II, Buckingham Depo. at 15-16). Fairchild produced prototypes which were tested by Fairchild and by the Army. (R. I at 55-56, 114; R. II, Buckingham Depo. at 33-34).

Finally, Fairchild was given *carte blanche* in drafting the technical manual for the unit: Fairchild hired its own technical writer, Fairchild's employee Robert Buckingham explained to the writer what was needed, and Fairchild's draft manual was adopted by the Army unchanged. (R. II, Buckingham Depo. at 20-21). Buckingham's only warning in the VEA4-3A manual went to the danger of electric shock if the unit were operated with the panel removed. The government never interpreted this to be a warning of danger in operating the unit because of its moving fan, as the Army instructed repair technicians to operate the unit with the panel off while troubleshooting malfunctioning units. Buckingham acknowledged that he knew precisely the risk involved in the strong fan pulling a repair person's hand or arm into the fan blades. (R. II, Buckingham Depo. at 30-31). Nevertheless, the district court and court of appeals found the government's participation sufficient to shield Fairchild from liability for this accident, as a matter of law.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

This is a diversity case, filed pursuant to 28 U.S.C. 1332.

BASIS FOR GRANTING THE WRIT OF CERTIORARI

The court of appeals erred in requiring a standard of mere "government review" for establishing the military contractor defense. This standard conflicts with those announced in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 101 L.Ed.2d 442, 108 S.Ct. 2510 (1988) and *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), which both required that the government actively exercise its discretion in approving military contracts.

The Fifth Circuit's opinion in this case, written by Honorable E. Grady Jolly, is in fact a tacit adoption of his dissent from the denial of rehearing *en banc* in *Trevino*. *Trevino v. General Dynamics Corp.*, rehearing denied *per curiam*, 876 F.2d 1154, 1155 (5th Cir. 1989). In that dissent, he argues that *Trevino* "effectively re[wrote] the Supreme Court's test for government contractor immunity given in *Boyle*." *Trevino* at 1155. He further argues that *Trevino* presents a potential conflict with a case decided contemporaneously, *Smith v. Xerox*, 866 F.2d 135 (5th Cir. 1989), although he acknowledges that "it is true that superficially the holdings of *Smith* and *Trevino* do not appear to be inconsistent." *Trevino* at 1156. Petitioner would respectfully submit that this case follows the law which Judge Jolly would adopt, but which is not that of the Fifth Circuit interpreting this Court's language in *Boyle*. The case, therefore, merits review and clarification.

The court of appeals further erred in implying that a failure to warn claim cannot exist independently of a design claim. This holding conflicts with both *Boyle* and *In Re Joint Eastern & Southern District New York Asbestos Litigation*, 897 F.2d 626 (2d Cir. 1990). Similarly, the court of appeals erred in holding that the danger of the moving fan blades, and its powerful suction, was so obvious as to preclude the necessity of a warning, and holding that the warning contained in the unit's predecessor manual was sufficient to put the government on notice.

ARGUMENT

1. The court of appeals erred in substituting "government review" for "government discretion" in determining whether the elements of the government contractor defense have been established.

In *Boyle*, this Court held that "uniquely federal interest[s]" preclude state law tort liability of private equipment contractors for design defects in military equipment when the contractor establishes the following three elements:

> (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 101 L.Ed.2d 442 at 458, 108 S.Ct. 2510 (1988).

Both the first and third elements of the *Boyle* defense are at issue here: petitioner Stout does not contend that a

manufacturing defect caused his injuries. He does contend, however, that design defects, coupled with failure to warn, were factors which resulted in his accident.

The Fifth Circuit, interpreting and applying *Boyle*, considered the element of "reasonably precise specifications" in depth, and established a standard for its determination in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989). The Fifth Circuit's opinion in this case abrogates that standard, tacitly replacing it with a different one, far easier for the contractor to meet, and unsupported by existing authority.

The first element of the *Boyle* test requires proof that the United States approved reasonably precise specifications for the item in question. The *Trevino* opinion held that this approval requires the exercise of governmental discretion in choosing a design feature. *Trevino* at 1480. When it is the contractor who exercises discretion over the design feature, the defense does not apply. *Trevino* at 1480. Once the discretion has been delegated to the contractor, the defense is not revived by government acceptance of the contractor's work. *Trevino* at 1485-86. Approval in that situation requires substantive evaluation and review of the contractor's design choices. *Trevino* at 1486.

The *Trevino* rule specifically requires the exercise of government discretion. The basis for this requirement is found in *Boyle*, which analogized from the Federal Tort Claims Act in creating an exemption from liability for discretionary acts by government officials. *Boyle v. United*

Technologies Corp., 101 L.Ed.2d at 457. The *Trevino* opinion elaborated upon that aspect of *Boyle*:

> [O]ur reading of the case law defining the notion of a "discretionary function" reveals that not all government acts involving some element of choice are discretionary functions, but only those that involve the use of policy judgment. When the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion. A rubber stamp is not a discretionary function; therefore, a rubber stamp is not "approval" under *Boyle*. *Trevino* at 1480.

Boyle itself does not define "approval," but does use language indicating active government involvement in the design process, using the discretionary function exception to the F.T.C.A., 28 U.S.C. 2680(a), as a guide:

> *[S]election* of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of the provision. It often involves not merely engineering analysis but *judgment* as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. *Boyle* at 101 L.Ed.2d 457.

It is only the exercise of this discretion, whether it be in choosing a design feature itself, or in evaluating a feature chosen by the contractor, that reaches the required level of approval of reasonably precise specifications. *Trevino* at 1480. *Trevino* has specifically rejected "rubber

stamping" by the military as a basis for granting contractor immunity. The *Trevino* opinion in holding that approving signatures by Navy employees on each page of working drawings were insufficient to constitute "approval" under *Boyle*, clearly distinguishing passive acceptance (delegation) from active involvement (discretion):

> The government exercises its discretion over the design when it *actually chooses* a design feature. The government delegates the design discretion when it buys a product designed by a private manufacturer; when it contracts for the design of a product or a feature of a product, leaving the critical design decisions to the private contractor; or when it contracts out the design of a concept generated by the government, requiring only that the final design satisfy minimal or general standards . . .

In contrast, the court of appeals opinion here has eliminated the requirement of discretion, replacing it with a requirement of mere review, in direct conflict with Trevino's interpretation of the *Boyle* elements. The court here held:

> [E]vidence in this record shows that the government did indeed approve reasonably precise specifications regarding the design of the condenser fan. We reach this conclusion because of the Army's thorough *review* of the design. The *review* involved, inter alia, Fairchild's submission of detailed drawings at various progressive stages of the design, critical design *reviews* where Army engineers critiqued Fairchild's work, and, finally, the production of prototype models tested and evaluated for months by the

> Army for its actual performance. *Stout v. Borg-Warner Corp.*, slip op. at 4238. (emphasis added).

The *Stout* opinion embraces no requirement for the exercise of discretion; rather, it contemplates only government review, whether expressed as such or as "critique" or "evaluation." Whichever label is used, under this opinion the government need only passively accept that which a private manufacturer has chosen in order to invoke *Boyle's* protection. This relaxed requirement is in conflict with both *Boyle* and *Trevino*, and amounts to the mere rubber-stamping previously eschewed in those opinions. A brief review of the facts in *Stout* demonstrates its tacit modification of the *Boyle* rule.

The summary judgment evidence in this case establishes only that the government reviewed design drawings of the Hawk Shop unit, supplied by the contractor. Although the evidence shows that the Army performed tests on the prototype model provided by Fairchild, nothing indicates that the tests resulted in any modification or other input to the unit's design. The evidence further establishes that the Army merely provided Fairchild with specifications required by private industry standards, and that Fairchild then designed the unit accordingly. Moreover, the Army made no decision as to whether to include or exclude a safety device on the unit's fan, although the Hawk shop's predecessor did not have such a device. As Fairchild alone created the new design drawings, a presumption should arise that it, and not the Army, decided to exclude any screen or other protective device. Under these circumstances, no government contractor immunity should attach. Certainly, fact questions to be decided by a jury are present.

Trevino, following *Boyle*, held that the government delegates the design discretion "when it contracts out the design of a concept generated by the government, requiring only that the final design satisfy minimal or general standards established by the government." *Trevino v. General Dynamics Corp.*, 865 F.2d at 1480. Passive acceptance by the Army of a contractor's completed plans is all that occurred here. The court of appeals' opinion thus has replaced the requirement of discretionary decision and approval of reasonably precise specifications with that of mere delegation or passive review.

The Fifth Circuit's opinion herein conflicts with prior authority from this court and its own decisions. It replaces the proper standards with a new, relaxed one. The opinion here should therefore be reviewed by this Court to determine whether this expansion of the government contractor defense enunciated in *Boyle* should stand.

2. The court of appeals erred in implying that a failure to warn claim cannot exist independently of a design claim.

The court of appeals' opinion is not entirely clear, but it implies that the failure to warn claim cannot survive alone if the design defect claim is not established. *Stout v. Borg-Warner Corp.*, slip op. at 4240 n. 2. This implication is in direct conflict with *Boyle* and with *In Re Joint Eastern & Southern District New York Asbestos Litigation*, 897 F.2d 626 (2d Cir. 1990) (hereinafter *"In Re Asbestos Litigation"*). The *Boyle* opinion states the three elements of the defense in the conjunctive, using the conjunction "and." *Boyle*, 101

L.Ed.2d at 458. Thus, the failure of the defendant to establish any one of the elements should defeat the government contractor defense.

Applying *Boyle*, the Second Circuit found that the failure to warn claim would be viable even in a situation precluding a design defect claim. *In Re Asbestos Litigation*, 897 F.2d at 630-31. By suggesting that the failure to warn claim cannot exist independently of the design defect claim, the Fifth Circuit's opinion directly conflicts with *Boyle* and *In Re Asbestos Litigation*.

The court of appeals compounded its error by holding that, in any event, the failure to warn claim could not stand since Texas law imposes no duty to warn when the danger is obvious or actually known to the injured person. *Stout v. Borg-Warner Corp.*, slip op. at 4240 n. 2. The Second Circuit, however, made it clear that the duty to warn under *Boyle* extends to the government, while state tort law might apply to the individual. *In Re Asbestos Litigation*, 897 F.2d at 633. The court of appeals in this case erroneously applied Texas tort law in its decision that Respondent had established the *Boyle* elements.

3. The court of appeals erred in holding that Fairchild's warnings were sufficient to apprise the government of risks involved in servicing its unit, and that the dangers involved were so obvious as to relieve Fairchild of its duty to warn.

This case also involves another aspect of *Boyle's* third element: Fairchild's failure to warn the Army of dangers in the use of the equipment that were known to it but not

to the Army. The Circuit Court of Appeals' opinion erroneously holds that the danger of the unguarded fan was actually known to the government: first, because a warning was contained in the technical manual for the VEA4-3 unit, the predecessor model to the air conditioner which severed Petitioner Stout's fingers; and second, the court opines that the danger posed by the moving fan blades was so obvious that "the Army must be charged with knowledge of the obvious risk that the fan posed," thus obviating the need for any warning at all. *Stout v. Borg-Warner Corporation*, slip op. at 4239. Both these conclusions are in error.

It is undisputed that Petitioner Stout was taught, by the Army, to check for freon blockage in the unit's lines by removing one of the side panels, and manually feeling the copper lines, starting with the compressor and working his way around the system. (R. II, Stout Depo. at 26-27). This is what he was trained to do while in air conditioning repair school at Fort Belvoir, Virginia. (R. I, Stout Depo. at 13, 15). The Army specifically trained air conditioning repair technicians to operate the Hawk Shop unit without panels while checking the freon flow. Clearly, Petitioner Stout was following proper Army procedures when this accident occurred. (R. II, Blietz Depo. at 35). The import of these circumstances is that the Army was never warned of the danger to technicians in troubleshooting the unit. There is no evidence that Fairchild ever recommended any other, safer way to check the temperature of the unit's freon lines: this, despite Fairchild's knowledge, testified to by Buckingham, the unit's lead designer and author of the manual that:

Q: It would certainly be your position and Fairchild's position that this machine should not be operated with that cover off the machine?

A: That's correct.

Q: And that it would certainly be dangerous with the power of that turbine in there if that were attempted?

A: That's correct. (R. II, Buckingham Depo. at 40).

The third element of the government contractor defense required that Fairchild warn the government of dangers in the use of its equipment known to Fairchild but not the U.S. If a fact question exists as to the reasonableness or adequacy of the warnings, then the defense becomes a jury question. *Boyle* at 101 L.Ed2d 459.

Here, the court of appeals relied upon a one-line instruction contained in the technical manual for the VEA4-3, this unit's predecessor, in determining that as a matter of law, the U.S. must have had knowledge of the fan's powerful suction force, with consequential danger to repair persons. Likewise, it relies upon the general instruction Stout recalled from his training "not to get his hand caught in the fan." Finally, the Fifth Circuit's opinion holds that, even absent express warnings, the fan's force was so obvious that the Army must be charged with knowledge of its danger. This third conclusion, petitioner submits, simply ignores the well-known (and highly treacherous) nature of moving blades, whether fans, turbines, or propellers: they are invisible to the naked eye, and therefore cannot be open and obvious in any event.

These three conclusions simply cannot support *Boyle's* warning element as a matter of law: at best, they create a fact question which must be resolved by a jury.

> Whether there is a duty to warn and the adequacy of warnings given must be evaluated in connection with "the knowledge and expertise of those who may reasonably be expected to use or otherwise come in contact with the product." *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 465-466 (5th Cir. 1976).

Clearly, Fairchild knew of the danger which would result if the unit was operated without its exterior panels: both electrocution and exposure to the moving fan blades. Nevertheless, Fairchild did not include a warning regarding the moving parts in the manual for the new Hawk Shop unit it designed, neither did it recommend any alternative method of performing the necessary diagnostic work a repair technician would be required to perform. The danger of turbine suction was not conveyed to the Army in such a way as to allow the government to adequately prepare its repair personnel for what Fairchild clearly understood to be a very dangerous practice.

For these reasons, the court of appeals' opinion again conflicts with the Supreme Court's opinion in *Boyle*. This Court should grant certiorari in order to resolve the conflicts.

CONCLUSION

Petitioner requests this Court to grant the Petition for Writ of Certiorari, reverse the judgment of the United States Court of Appeals for the Fifth Circuit, and remand this case to the district court for trial on the merits.

Respectfully submitted,

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Kendall STOUT, Plaintiff-Appellant,

v.

BORG-WARNER CORPORATION, et al., Defendants,

Fairchild-Hiller Stratos Division, Defendant-Appellee.

No. 90-8294.

United States Court of Appeals, Fifth Circuit

June 13, 1991.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, JOLLY and DAVIS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this product liability action, Kendall Stout, a former United States Army Corporal, caught his hand in a fan. He brought suit against Fairchild-Hiller Stratos Division of Fairchild Industries, Inc. ("Fairchild"), the designer and manufacturer of a 38,000 BTU air conditioning unit used by the United States Army to cool its Hawk Missile System Mobile Repair Unit. It was while he was attempting to repair the air conditioning unit that his right hand was caught in the rotating blades of the unit's condenser fan. He appeals the district court's award of summary judgment granting Fairchild immunity from Stout's defective design and failure to warn claims under the government contractor defense set forth in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). We affirm.

I

Kendall Stout was a United States Army air conditioning repair technician stationed at Fort Bliss, Texas. On September 6, 1985, he lost four of his fingers and one-half of his thumb on his right hand while attempting to repair a VEA4-3A air conditioning unit. He was injured while checking for blockage in the Freon system by manually feeling the temperature differences in the copper lines running from the unit's compressor. To conduct this inspection, Stout had removed the side panels of the air conditioner while the unit was still in operation. There is a factual dispute as to whether the suction created by the condenser fan forced his right hand across the fan's rotating blades or whether Stout himself inadvertently flinched his hand across the blades. The Army, however, after conducting an investigation, concluded that the accident was caused by Stout's own negligence, which supports the latter version of how the accident happened.

The VEA4-3A air conditioner is used by the United States Army to cool the Hawk Missile System Repair Unit. The air conditioner mounts on the side of the Hawk radar repair shelters. It serves to maintain controlled atmospheric conditions inside the shelter, preventing damage to the sensitive computers and radar systems essential to the performance to the Hawk Missile System.

The Army Corps of Engineers had developed the predecessor to the VEA4-3A air conditioner known as the VEA4-3. In the early 1960s, the Army Corps of Engineers at Fort Belvoir's Army Research and Development Center wrote and issued initial specifications for a redesigned VEA4-3 air conditioner for specific use with the Hawk

Missile System. The Army's initial specifications included engineering design drawings and required shop drawings and pre-production models. The Army's specifications for the unit's condenser fan were as follows:

> *Air-handling components.* All air fans shall be of the continuous-duty type, statically and dynamically balanced.
>
> *Fan motors.* The evaporator and condenser fan motors shall be of continuous-duty type, totally enclosed, and fungus-proofed and shall be equipped with permanently lubricated ball bearings. The motors shall be equipped with thermal overload protectors sized to prevent motor operation above the safe operating temperature for which the motor is rated.

Notably, these specifications did not provide for, or prohibit, the installation of a safety device, such as a wire screen to cover the condenser fan.

In 1966, Fairchild was awarded the contract to redesign the VEA4-3. Fairchild performed a detailed engineering analysis, including engineering calculations to select components for the VEA4-3A that would comply with the Army's specifications. This detailed engineering analysis was then reviewed and approved by Army engineers.

Fairchild next developed a complete preliminary design layout, consisting of several engineering drawings of the assembled configuration and dimensions of the air conditioning unit. The preliminary design layout was submitted to Army engineers for a formal preliminary design review. At this time, the Army engineers critiqued

the layout, made changes in the preliminary drawings, and then approved the preliminary design.

Fairchild then prepared detailed drawings from which each component of the unit would be fabricated. As with the initial engineering analysis and the preliminary design layout drawings, these detailed design drawings were submitted to the Army for review, evaluation, and approval and were subject to any changes desired by the Army at a critical design review. The critical design review lasted several days and every component of the VEA4-3A was reviewed by Army engineers.

After the Army granted its final approval of the detailed drawings, the design was "frozen." Any variation by Fairchild from the detailed design at this point would result in automatic rejection of the unit by the Army.

After the detailed design had been approved and the design frozen by the Army, Fairchild was required to fabricate each part specified in the detailed drawings and build prototype models. These models underwent extensive testing for several months by both Fairchild and the Army to analyze and evaluate the VEA4-3A design for actual performance. After the performance testing was completed, the Army spent approximately one month reviewing and evaluating the test results. Thereafter, the Army gave its final approval to the design of the unit and accepted bids for the manufacture of VEA4-3A. Fairchild was awarded the manufacturing contract, and production of the unit began shortly thereafter.

Fairchild also prepared the technical manual for the VEA4-3A. The manual contained a warning about operating the unit without its side panels, as follows:

> The operating voltage of this air conditioner is dangerous to persons coming in contact with any part of the electrical system. Severe, possible fatal, shock may result. Disconnect the power source before performing any maintenance or inspection, other than operating tests of the air conditioner.

In addition, the manual accompanying the preceding model, the VEA4-3, contained the following warning:

> Never perform maintenance on the air conditioner when the unit is operating.
>
> Always operate the air conditioner with all panel tightly secured to prevent personal contact with electrical components or moving parts.

Stout stated in his deposition that he had been trained to repair air conditioning units at Fort Belvoir, Virginia. He further stated that, notwithstanding the warnings contained in the two manuals, he had been taught to identify problems in the Freon system of such units by taking the side panels off while the unit was still in operation and feeling the lines to determine if the flow of Freon was blocked.

II

On June 16, 1987, Stout filed a products liability action against several defendants. The complaint alleged that the VEA4-3A was unreasonably dangerous because of its defective design because there was no safety device

that would prevent contact with the condenser fan while the unit was in operation. The complaint also alleged that the technical manual failed to warn about the danger. After discovery, all defendants except Fairchild were dismissed. Fairchild filed a motion for summary judgment, asserting the military contractor defense set forth by the United States Supreme Court in *Boyle v. United Technologies, Inc.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). The district court granted Fairchild's motion for summary judgment, and Stout filed this appeal.

III

We review the district court's summary judgment award using the same standard as that employed initially by the trial court under Rule 56, Fed.R.Civ.P. *USX Corp. v. Tanenbaum*, 868 F.2d 1455, 1457 (5th Cir.1989). Under Rule 56, summary judgment is proper only where "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." In determining whether fact issues exist, we are required to view the evidence in the light most favorable to the nonmoving party.

As is obvious from the foregoing, the issue on this appeal is whether summary judgment was erroneously granted on the grounds that the government contractor defense barred Stout's claims. This issue will be determined by our application of *Boyle v. United Technologies, Inc.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), to the undisputed facts.

The Supreme Court in *Boyle* reformulated the elements of this defense. The Supreme Court recognized

that applying state law to hold government contractors liable for design in military equipment might significantly conflict with federal interests and policy. The Supreme Court reasoned that in such cases the cost of the court judgment would ultimately be passed through to the government, thus abrogating the immunity otherwise enjoyed by the government in those cases. Such a result was intolerable, and in those circumstances federal policy displaced state law.

The *Boyle* Court reasoned that the displacement of state law occurs, and that government contractors are immunized from liability for design defects in military equipment under state law, when (1) the government approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the contractor warned the government about the dangers in the use of the equipment that were known to the contractor but not to the government. *See Boyle,* 108 S.Ct. at 2518. The first two elements of the defense assure that the government, and not the contractor, is exercising discretion in selecting the design. The third element is necessary to eliminate any incentive that this defense may create for contractors to withhold knowledge of risks.

A

(1)

Stout argues that the government contractor defense does not apply to his defective design claim because Fairchild was required to comply only with general specifications in designing the air conditioning unit and

because Fairchild failed adequately to warn the government about the dangers of the open fan housing of which the government otherwise did not know. Stout does not dispute that the VEA4-3A air conditioning unit conformed to the Army's final design specifications.

Stout's claim for defective design is that the VEA4-3A was unreasonably dangerous because Fairchild failed to provide a protective device to prevent contact with the rotating blades of the condenser fan. Stout argues that the Army's specifications were not "reasonably precise." Certainly, he argues, the plans did not preclude Fairchild from installing a protective device. Furthermore, he contends that the Army only accepted, but did not approve within the meaning of *Boyle*, the fan specifications drafted by Fairchild. Thus, because Fairchild could have complied with both its duty pursuant to the government contract's design specifications and with its own duty under state tort law to design a reasonably safe product, no significant conflict between state law and federal interests existed. The government contractor defense therefore does not apply, according to Stout.

Fairchild responds that the Army approved reasonably precise specifications. Fairchild insists that the Army retained control of the design process by making modifications to the design as it was refined and by reserving the absolute right to reject or modify the design at every step of the engineering process. Fairchild admits that the initial fan specifications prepared by the Army did not include or prohibit the installation of a safety device, but it argues that these initial specifications constituted only a small part of the total design process. The Army reviewed, evaluated, tested and approved detailed design

drawings at different stages during the process and ultimately the prototype model. With regard specifically to the condenser fan, the Army approved specifications prepared by Fairchild amounting to over fifty pages of detailed design drawings. Also, the fan itself was built and incorporated into the prototype model that was tested and inspected by the Army before its approval for manufacture.

Additionally, Fairchild points out that the condenser fan in the VEA4-3A was virtually identical to the fan in the VEA4-3, which had been developed and used by the Army for ten years before the development of the VEA4-3A. The design of the VEA4-3 actually dictated much of the VEA4-3A design and, in truth, the design of the two units did not substantially differ. According to Fairchild, the absence of any significant difference between the two designs supports its argument that the Army, and not Fairchild, controlled the decision not to place a safety device over the condenser fan.

Finally, Fairchild directs us to the evidence that showed a protective screen covering the condenser fan would restrict the air flow of the unit and impair its ability to operate effectively in extreme hot weather conditions. The fan that the Army approved without such a safety feature, Fairchild argues, should be regarded as reflecting the Army's discretion in balancing safety against performance. This evidence included the deposition statement of Buckingham, Fairchild's senior engineer in charge of redesigning the unit, to the effect that a screen would have been impracticable. The evidence also

included the deposition statement of Chief Warrant Officer Allen Blietz, Stout's superior officer. He had submitted a proposal after Stout's accident suggesting that a safety screen be installed next to the condenser fan, but the Army had rejected the proposal, stating only that the safety screen was not feasible.

(2)

This court has confronted the question of what constitutes "reasonably precise specifications" and "approval" for purposes of applying the first element of the government contractor defense. For example, in *Smith v. Xerox Corp.*, 866 F.2d 135, 138 (5th Cir.1989), we determined that a contractor who could not produce the government's original specifications for the manufacture of military equipment was nevertheless entitled to rely on the defense. We held that because the contractor in *Smith* was able to produce other evidence, including a listing of those specifications, a copy of the government's performance criteria, and a production contract, the evidence in its entirety showed that the government had approved reasonably precise specifications.

In *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), we were called upon to determine the meaning of "approval." We concluded, inter alia, that [i]f the government has . . . delegated its discretion [over the design feature in question] to the contractor, mere government acceptance of the contractor's work does not resuscitate the defense unless there is approval based on substantive review and evaluation of the contractor's design choices." *Trevino*, 865 F.2d at 1486. In *Trevino*, we

distinguished between situations in which the government engages in a substantive review and evaluation of the relevant design features prepared by the contractor and other situations in which the government does not engage in a meaningful review of the design but merely accepts the contractor's design choice. The former action by the government we characterized as constituting "approval" sufficient to establish the first prong of the defense; the latter action we characterized as "rubber stamping," action that indicates that the contractor, and not the government, exercised the actual discretion over the defective feature. We further concluded that rubber stamping could occur even when the government retained the right to reject the design at any stage of the design process.

In the case before us, we must decide whether the government approved of reasonably precise design drawings or whether it only rubber-stamped its acceptance of such drawings. We hold that evidence in this record shows that the government did indeed approve reasonably precise specifications regarding the design of the condenser fan. We reach this conclusion because of the Army's thorough review of the design. The review involved, inter alia, Fairchild's submission of detailed drawings at various progressive stages of the design, critical design reviews where Army engineers critiqued Fairchild's work, and finally, the production of prototype models tested and evaluated for months by the Army for its actual performance. *See Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698, 701 (4th Cir.1989) (governmental participation in various stages of product's development

establishes military contractor defense); *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1320 (11th Cir.1989) (requirement that government approve reasonably precise specifications is met where contractor incorporated design that government subsequently reviewed and approved). We conclude, therefore, that Fairchild is entitled to immunity from Stout's product liability suit, assuming that the third element of the government contractor defense is met.[1]

B

Stout next argues that the third element of the defense – that Fairchild warned the Army about the dangers in the use of the VEA4-3A that were known to Fairchild but not to the Army – was not satisfied because there was no evidence that Fairchild warned the government about the unguarded condenser fan. Stout claims that he was specifically instructed by the Army to remove the unit's side panels while it was still in operation and to check for blockage in the Freon system by running his hand along the copper lines. Stout concedes that this method of repair was not advocated in the technical

---

[1] The facts of this case are clearly distinguishable from the air conditioner example given by the Supreme Court in *Boyle*. *Boyle*, 108 S.Ct. at 2516. In that example, the government had contracted for the purchase of air conditioning units. Unlike this case, however, the government was indifferent to the challenged design. The Court presented this example only to illustrate that "state law would [not] generally be pre-empted" and not to show that a conflict exists between federal interests and state law in every case involving a government contract for air conditioning units. *Id.*

manual accompanying the VEA4-3A. He insists, however, that the fact that the Army taught him this method of repair indicates that Fairchild did not warn the Army about the risk posed by the condenser fan. We reject Stout's argument for two reasons.

First, Fairchild only had the duty to warn the government of dangers of which the government had no knowledge. The danger posed by the unguarded fan was actually known to the government as evidenced by both a written and oral warning. As to the written warning, the inside cover of the technical manual for the VEA403, the model immediately preceding the VEA4-3A, warned against performing maintenance when the air conditioner is in operation. It also contained the following statement: "Always operate the air conditioner with all panels tightly secured to prevent personal contact with electrical components or moving parts." In an affidavit submitted in support of Fairchild's summary judgment motion, Buckingham stated that the unit only had two moving parts which would create a risk of personal injury if its side panels were removed while still in operation. The condenser fan constituted one of these two parts. That the warning was contained in the VEA4-3 manual, rather than in the VEA4-3A, is of no material relevance. The unscreened fan design of the older VEA4-3 was virtually identical to the VEA4-3A's, as was the fan itself. Indeed, the Army required the fans to be interchangeable in its specifications. As to the oral warning. Stout admitted in deposition testimony that his instructor at Fort Belvoir had specifically warned him not to get his hand caught in

the fan while performing repairs. This admission demonstrates undisputed knowledge of the risk involved in repairing the unit in this manner.

Second, according to Chief Warrant Officer Blietz, the danger of coming into contact with the blades of the fan was obvious to anyone who observed the air conditioner in operation. The unit was so powerful that it would propel any object placed on the fan outlet like a shell from a cannon. Thus, even in the absence of the express warnings discussed above, the Army must be charged with knowledge of the obvious risk that the exposed fan posed. There was thus no need for Fairchild to communicate this warning for the government contractor defense to apply. *See Trevino*, 865 F.2d at 1487 n.13.

That Stout may have been trained to repair the unit with its side panels removed does not necessarily imply that the Army did not know of the risk of this method of repair. Indeed, Chief Blietz's oral warning shows that the Army knew about the risk involved.

In sum, because the Army approved reasonably precise specifications, because the air conditioning unit indisputably conformed to those specifications, and because the Army had knowledge of the risk involved in repairing the unit in the manner which resulted in Stout's injuries, the district court's summary judgment award holding that Fairchild was entitled to immunity under the government contractor defense was not erroneous.[2]

---

[2] Stout's argument is unclear but we conclude from his brief and his discussion at oral argument, that he does not

(Continued on following page)

IV

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

(Continued from previous page)

contend that his failure to warn claim can survive the government contractor defense if his design claim does not. Stout does cite in his brief the Second Circuit Court's decision in *In re Joint Eastern & Southern District New York Asbestos Litigation*, 897 F.2d 626, 630 (2d Cir.1990), holding that a government contractor must show that the contract specifically includes warning requirements that significantly conflict with the duty to warn under state law in order for the government contractor defense to apply to a failure to warn claim. He does so, however, only to support his argument that Fairchild's summary judgment evidence did not meet *Boyle's* third prong as a matter of law. Thus, we do not address any alleged conflict between our decision in *Smith v. Xerox Corp.*, 866 F.2d 135, 137 (5th Cir.1989) and the Second Circuit's decision in *In re Asbestos Litigation* with respect to the survival of a duty to warn claim under the circumstances presented in this case.

In any event, our failure to review this potential issue does not result in manifest injustice to Stout. Under Texas law, there is no duty to warn when the danger is obvious or actually known to the injured person. *See Hagans v. Oliver Mach. Co.*, 576 F.2d 97, 102 (5th Cir.1978).

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

KENDALL STOUT	)	
V.	)	EP-87-CA-204B
	)	(Filed Apr. 9, 1990)
FAIRCHILD-HILLER STRATOS	)	
DIVISION OF FAIRCHILD	)	
INDUSTRIES, INC.	)	

JUDGMENT

BEFORE THIS COURT came to be considered the Defendant's Motion for Summary Judgment in the above-numbered cause. In its Complaint, Plaintiff sought to recover damages against Defendant on a tort theory of recovery. For reasons set out in the Court's Memorandum Opinion on Motion for Summary Judgment, the Court finds the Defendant availed itself of the military contractor defense and is therefore immune from tort liability under the facts submitted by Plaintiff. Accordingly, Judgment shall issue for the Defendant.

IT IS THEREFORE ORDERED Plaintiff shall take nothing by his suit against the Defendant.

IT IS FURTHER ORDERED costs of Court shall be assessed against the Plaintiff.

SIGNED AND ENTERED this 5th day of April, 1990.

/s/ Lucius D. Bunton
LUCIUS D. BUNTON
CHIEF JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

KENDALL STOUT	)	
	)	EP-87-CA-204B
V.	)	(Filed Apr. 9, 1990)
	)	
FAIRCHILD-HILLER STRATOS	)	
DIVISION OF FAIRCHILD	)	
INDUSTRIES, INC.	)	

MEMORANDUM OPINION ON MOTION FOR SUMMARY JUDGMENT

BEFORE THIS COURT is the Motion of the Defendant, Fairchild-Hiller Stratos Division of Fairchild Industries, Inc. ("Fairchild"), for Summary Judgment in the above-numbered cause. Having reviewed the Motion and accompanying affidavits, the Responses and Replies thereto as well as the relevant authorities, this Court is of the opinion Fairchild's Motion is meritorious and Summary Judgment should be entered against the Plaintiff.

STANDARD ON MOTION FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that the moving party is entitled to a judgment as a matter of law." Rule 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an

> adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.

Thus, the focus of this Court is upon disputes over material facts; facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986); *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 272 (5th Cir.), *cert. denied*, 484 U.S. 851, 108 S.Ct. 152, 98 L.Ed.2d 107 (1987), and the cases cited therein.

The Supreme Court's 1986 trilogy of summary judgment cases clarified the test for granting summary judgment. In *Anderson v. Liberty Lobby*, the Court stated the trial court must consider the substantive burden of proof imposed on the party making the claim. In the case before this Court, the Plaintiff has the burden with respect to his claims; the Defendant has the burden with respect to certain defenses it raises. The Court in *Anderson v. Liberty Lobby* defined "material" as involving a "dispute over facts which may affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby* requires this Court to substantively evaluate the evidence offered by the moving and non-moving parties to determine whether the evidence raises a "material" fact question which is "genuine."

In a second case, the Supreme Court reiterated that where the party moving for summary judgment has established *prima facie* that there is no genuine issue as to any material fact, the non-moving party must then come forward with "specific facts" showing a genuine issue for

trial. It must be "more than simply . . . that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). A third case, *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) held that where the moving party shows that the opposing party is unable to produce evidence in support of its case, summary judgment is appropriate. In *Celotex Corp.*, it was not necessary for the motion for summary judgment to be supported by affidavits or other material specifically negating the non-moving party's claim so long as the District Court was satisfied that there was an absence of evidence to support it. At that point the burden shifted to the non-moving party to produce evidence in support of its claims; if it did not produce any, summary judgment was required.

This Court has demonstrated its willingness to allow non-moving parties their day in court in borderline cases where under governing law or reasonable extensions of existing law, the hearing of some testimony would be helpful to understand the proper application of the law. Such is not the case in the suit *sub judice*, however. The Court finds there are no fact issues warranting submission of the case to a jury. Further, the Fifth Circuit exemplified the use of summary judgment in military contractor defense cases such as this in *Smith v. Xerox Corporation*, 866 F.2d 135 (5th Cir. 1989). Accordingly, the Court shall grant the Defendant's Motion for Summary Judgment.

BACKGROUND

The facts comprising the case before the Court are tragic; on September 6, 1985, Plaintiff, a corporal in the United States Army, performed a technical inspection on a 38,000 BTU air conditioner to determine why the unit was not cooling. The unit was a component of the Hawk Shop 8 Shelter, which is a mobile repair unit for the Army's Hawk Missile System. While conducting a manual inspection of the unit while in operation, Plaintiff's hand was sucked into the fan blades, severing his fingers and part of his thumb. Plaintiff filed this suit against Fairchild, the designer of the air conditioner, model VEA4-3A, claiming defective design, breach of express and implied warranty, and negligent design, manufacturing and marketing of the air conditioner. In its Motion for Summary Judgment, Fairchild claims it is immune from state tort claims under the military contractor defense as set forth by the Supreme Court in *Boyle v. United Technologies Corporation*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988).

DISCUSSION

The *Boyle* case stands for the proposition that state tort law is preempted in cases involving military equipment defects when "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Boyle*, 101 L.Ed.2d at 458. Plaintiff concedes the *Boyle* factors are applicable, although he

disputes that each has been satisfactorily met. Response to Defendant's Motion for Summary Judgment. The Court shall discuss each element seriatim.

In its analysis of the reasonably precise specification element the Fifth Circuit, noting the *Boyle* decision is sparse on direction, has utilized pre-*Boyle* case law for guidance. Specifically, the *Smith* court looked to the opinion in *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984), wherein the court stated:

> [I]f the United States neither set specifications for the system (other than general outlines of what type of system it required) nor approved [the contractor's] final reasonably detailed specifications by examining and agreeing to a detailed, description of the workings of the system) – then [the contractor] is subject to strict liability under the rule set forth in section 402A [of the Restatement (Second) of Torts].

McKay, at 453. Reasonably precise specification was found in the remanded *Boyle* case where the defendant (the manufacturer) and the Navy "worked together to prepare detailed specifications;" held "back-and-forth discussions;" Defendant built a model of the equipment including the claimed defective part and the Navy inspected the model and approved the design. *Boyle*, 792 F.2d 413, 414-5 (4th Cir. 1986). In *Smith*, the Court found reasonably precise specifications where the contractor failed to produce complete specifications for the original equipment it manufactured, but produced a listing of the specifications, a copy of the original Government performance criteria dictating the Government's environmental

specifications, a production contract furnished by the contractor for a series of the equipment containing specific reference to the government-approved specifications, and deposition testimony that the Army reviewed and approved the drawings and specifications prepared by Xerox. *Smith*, at 138. In another case, *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 327, 107 L.Ed.2d 317 (1989), the Fifth Circuit declined to reverse the trial court's finding that reasonably precise specifications were not provided by the Government. In *Trevino*, the trial court found the Government only set general performance standards but left design specifications to the discretion of the contractor. After the accident precipitating suit occurred, the Navy investigation concluded that one of the problems with the design was the absence of a formal Navy design review. *Trevino*, at 1486-7.

Turning to the facts presented to the Court, it is readily apparent the Government imposed significant design requirements upon Fairchild, including the exact size, weight, interfacing, housing, location of control panel, air conditioner and compressor voltage operation, air flow rate, lubrication, wiring, painting, metal fabrication, soldering, welding, bolted and riveted connections, and performance characteristics of the VEA4-3A.[1] The VEA4-3A was designed specifically for the Hawk Missile

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[1] Fairchild won the initial bid to develop the cooler, i.e. put together design specifications, a prototype and a design manual. After the development phase, the Army opened the bidding to the public for the manufacture of the cooler, a bid Fairchild subsequently won as well. Buckingham deposition at p. 12-3.

Program, the specifications having been produced by the Army Corps of Engineers and the Army Research and Development Center. Buckingham Deposition at p. 13-4. In addition, some thirty-four test requirements were exacted from the unit. Preliminary designs were presented to the Army for initial review. Changes were made by the Army prior to initial approval. Thereafter, Fairchild submitted detailed drawings of the unit for critical design review. The critical design review lasted several days, after which a prototype was manufactured and tested by the Army for some four to six months. Approval of the equipment design "froze" the design, after which no additional changes were allowed.

Following the design approval, Fairchild, under separate contract, prepared the operating manual for the VEA4-3A. Detailed military specifications controlled the format of the manual, its organization, its content, subjects to be covered, specifications regarding any photographs, drawings or schematic diagrams, etc. The initial proposed draft of the manual was then submitted for review, changes and approval. *See*: Affidavit of Robert Buckingham in support of Motion for Summary Judgment (filed November 29, 1988); Supplemental Affidavit in Support of Motion for Summary judgment (filed January 19, 1989). Having reviewed the extensive specifications attached to the above-mentioned affidavits, this Court is of the opinion the Government furnished reasonably precise specifications, leaving Fairchild little room for creativity in the design of the VEA4-3A. The facts show the design phase was very similar to that detailed in the *Smith* case, and this Court sees no reason

to deviate from those conclusions arrived at by the Fifth Circuit in *Smith*.

The second element which Defendant is required to prove to avail itself of the military contractor defense is that the design of the VEA4-3A actually met the Government's design specifications. As pointed out above, it is clear t..e VEA4-3A went through several inspection and approval phases prior to its ultimate installation at Fort Bliss. A proto-type was manufactured and tested to insure it conformed to design specifications. After the proto-type was inspected and approved, further changes to the design of the cooler were prohibited. The Government accepted the VEA4-3A coolers as fully complying with the design specifications and used VEA4-3As for some seventeen years prior to the accident at bar.[2] Further, Plaintiff produced no evidence the VEA4-3A air conditioners did not conform to the specifications formulated by the Army. For these reasons, this Court is of the opinion the second prong of the *Boyle* test was met in this case.

The final element, that Fairchild warned the Army of any dangers inherent in the cooler of which the Army was not aware has also, in this Court's opinion, been met. The technical manual approved by the Army makes the following precautionary references:

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[2] Mr. Buckingham testified in his deposition that the manufacturing of the VEA4-3A began in 1968. Buckingham Deposition at p.11.

During Operation:

Never perform maintenance on the air conditioner when the unit is in operation.

Always operate the air conditioner with all panels tightly secured to prevent personal contact with electrical components of moving parts.

This Court is of the opinion these precautions clearly underline a risk of electrical shock as well as injury resulting from contact with moving parts. Further, deposition testimony of Gene Blietz, Chief Warrant Officer of the 13th Ordinance Company, revealed Blietz' knowledge that the cooler fan was extremely powerful and that if an object such as a book or roll of toilet paper was placed on top of one of the outlet areas above the turbine when the cooler was operating, the object would shoot out as if propelled by a force such as a gun. Blietz Deposition at p. 24. In light of the foregoing, this Court is of the opinion the United States had knowledge of the potential hazards of injury due to the power of the turbines and as a result of contact with the moving fan blades.

For the reasons outlined above, this Court finds this case fits within the exemption from state tort liability carved out by the Supreme Court in the *Boyle* opinion. Accordingly, the Defendant shall go free from liability for the injuries sustained by Corporal Stout and Stout shall take nothing by his suit.

IT IS THEREFORE ORDERED the Motion of the Defendant for Summary Judgment is hereby GRANTED.

IT IS FURTHER ORDERED Kendall Stout shall take nothing by his suit against Fairchild-Hiller Stratos.

SIGNED AND ENTERED this 5th day of April, 1990.

/s/ Lucius D. Bunton
LUCIUS D. BUNTON
CHIEF JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8294

KENDALL STOUT,
Plaintiff-Appellant,

versus

BORG-WARNER, CORPORATION, ET AL.,
Defendants,

FAIRCHILD-HILLER STRATOS DIVISION,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 6/13/91, 5 Cir., 198_, ___ F.2d ___)

(July 15, 1991)

Before WISDOM, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

FILED
NOV 12 1991
OFFICE OF THE CLERK

(2)

No. 91-427

In The

Supreme Court of the United States

October Term, 1991

KENDALL STOUT,

Petitioner,

v.

BORG-WARNER CORPORATION, ET AL.,

Defendants,

FAIRCHILD-HILLER STRATOS
DIVISION OF FAIRCHILD INDUSTRIES, INC.,

Respondent.

Petition For Writ Of Certiorari
To the United States Court Of Appeals
For The Fifth Circuit

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Stout v. Borg-Warner Corp., 933 F.2d 331 (5th Cir. 1991)..... *passim*

Trevino v. General Dynamics Corp., 865 F.2d 1474 (5th Cir. 1989), *cert. denied*, 107 L.Ed.2d 317 (1989) ..... *passim*

No. 91-427

In The

Supreme Court of the United States

October Term, 1991

KENDALL STOUT,

Petitioner,

v.

BORG-WARNER CORPORATION, ET AL.,

Defendants,

FAIRCHILD-HILLER STRATOS
DIVISION OF FAIRCHILD INDUSTRIES, INC.,

Respondent.

Petition For Writ Of Certiorari
To the United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Kendall Stout ignored explicit warnings, and in defiance of common sense, slipped his hand into the innards of an operating VEA4-3A military air conditioning unit. As a result, Stout's hand was injured by the blades of an extremely loud and powerful exhaust fan located inside the unit. The fan was securely separated from human contact by the VEA4-3A's side panels, but Stout ignored his Army training and warnings in the

unit's technical manuals by removing the panels while the unit was operating.

Respondent Fairchild-Hiller Stratos Division of Fairchild Industries, Inc.[1] ("Fairchild") designed and manufactured the VEA4-3A unit under the close supervision of Army engineers, and in strict compliance with highly detailed specifications that were reviewed, evaluated and approved by the Army. The VEA4-3A was specifically designed and solely used to maintain controlled atmospheric conditions inside the Army's Hawk missile radar repair shelters, which contain sensitive computers and radar systems. The VEA4-3A mounted on the side of the mobile Hawk shelters, and utilized the same fan design as that used by the Army in a predecessor model, the VEA4-3, for some ten years prior to the development of the VEA4-3A in the 1960's.

Fairchild also prepared a VEA4-3A technical manual pursuant to a separate Army contract. The manual was drafted according to precise Army specifications, and was reviewed and approved by the Army prior to acceptance. The VEA4-3A manual in Stout's possession at the time of his injury was a different version than that prepared by Fairchild, as the Army had revised and replaced the VEA4-3A manual in the 1970's without consulting or involving Fairchild.

Petitioner sought redress from Respondent for the injuries to his hand, contending Respondent defectively

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[1] In August, 1989, the assets of Respondent Fairchild Industries, Inc. were acquired from its parent, The Fairchild Corporation, by Fairchild Space and Defense Corporation, which is a subsidiary of MATRA Aerospace, Inc.

designed the VEA4-3A by failing to provide an internal protective screen over its fan blades. Petitioner also claimed that Respondent did not adequately warn the Army of the dangers posed by the VEA4-3A's fan. The courts below held that Petitioner was not entitled to such redress because Respondent proved by summary judgment that (1) reasonably precise specifications for the VEA4-3A and its fan were approved by the Army, (2) the VEA4-3A units manufactured by Respondent conformed to the approved specifications, and (3) Respondent warned the Army about the dangers in the use of the VEA4-3A that were known to Respondent but not to the Army. *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir. 1991). Respondent therefore satisfied the requirements of the military contractor defense under *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988), and Respondent is entitled to share in the government's immunity from state tort liability for injuries resulting from the use of military equipment.

SUMMARY OF ARGUMENT

Petitioner raises three arguments in his application for certiorari. None identify any conflict between *Stout* and either *Boyle* or other circuit decisions. Petitioner disagrees with the Fifth Circuit's factual findings in its *de novo* review of the summary judgment evidence, but he fails to articulate any special or important reason for this Court to review the *Stout* opinion.

Petitioner first argues that *Stout* weakens the approval standard under *Boyle* and *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), *cert. denied*,

107 L.Ed.2d 317 (1989). However, *Stout* follows other circuit opinions in finding adequate government approval because the Army subjected Respondent's drawings and prototypes to substantive and meaningful review prior to approval.

Petitioner's second argument was not raised in the courts below, and therefore presents nothing for review. Petitioner points to the dictum in *Stout's* second footnote which, Petitioner admits, only implies that a failure to warn claim cannot survive alone if a defective design claim is defeated by the *Boyle* defense. The footnote only observes that Petitioner never raised a failure to warn claim as distinct from his defective design claim. *Stout*, 933 F.2d at 337, n.2. Any perceived conflict among the circuits on this issue is not reviewable in this case, since the Fifth Circuit did not decide anything pertaining to the survival of warning claims under *Boyle*.

Petitioner's third argument complains that the Fifth Circuit should not have found the fan to be an open and obvious danger because moving fan blades are invisible to the naked eye. This argument fails to identify any conflict among the circuits or with *Boyle*. The fan was extremely powerful, noisy, and could shoot objects off its exhaust port like a cannon. Several circuits have presumed military knowledge of equipment dangers where the military has had extensive experience with the equipment in question. The Army had over twenty years of use with the same fan design used in the VEA4-3 and the VEA4-3A. No warnings are required from a contractor where the danger is known to the military, and thus the Fifth Circuit properly found that *Boyle's* third element was met as a matter of law.

None of Petitioner's three contentions merit further review. There is no new, easier or different standard for government approval in *Stout*, nor does it conflict with other decisions in any other respect. The implications of a footnote's dictum does not merit the review of this Court, nor do the other misperceived errors suggested by Petitioner's three arguments. Stout's petition for writ of certiorari should be denied.

ARGUMENT

1. *Boyle's* First Element was Satisfied by the Army's Thorough Review.

Petitioner argues that "the Court of Appeals' opinion here has eliminated the requirement of discretion [from the government contractor defense], replacing it with a requirement of mere review." Petition, p. 10. Petitioner refers to the opinion's use of the terms "review", "critique" and "evaluation" as evidence that the Fifth Circuit has established a "new, relaxed standard" of "passive acceptance" that conflicts with the "*Trevino* rule" and *Boyle*. Petition, pp. 10-12. Petitioner equates the *Stout* opinion's finding of sufficient government approval with the "rubber stamp" acceptance rejected in *Trevino*, 865 F.2d 1474. Petition, p. 11.

There is no new standard, no conflict between the opinion below and *Trevino* or *Boyle*, nor does *Stout* permit "rubber stamp" approval. Instead, the Fifth Circuit found that the Army conducted a substantive review and evaluation of the design of the VEA4-3A that more than satisfied *Boyle's* requirement of governmental approval of reasonably precise specifications. *Stout*, 933 F.2d at

335-36. The *Stout* opinion's use of the terms "review" and "evaluation" demonstrates harmony with *Boyle* and *Trevino*, rather than divergence.

Even Petitioner describe's *Trevino's* analysis of the approval requirement with the same terms: "[o]nce the discretion has been delegated . . . [a]pproval . . . requires substantive *evaluation* and *review* of the contractor's design choices." Petition, p. 8 (emphasis added). Again, Petitioner refers to evaluation as necessary for *Boyle's* approval: "it is only the exercise of this discretion, whether it be in choosing a design feature itself, or in *evaluating* a feature chosen by the contractor, that reaches the required level of approval of reasonably precise specifications." Petition, p. 9 (emphasis added).

In this case, the Army's in depth evaluation of a feature (the fan) constitutes an exercise of discretion sufficient to establish the government contractor defense. The record establishes that the Army was actively involved in the design process of the VEA4-3A from the very start. See, e.g., R.I, pp. 114-16; R.II, Buckingham's Depo., pp. 14-17. It conducted a step-by-step review and evaluation of the VEA4-3A design, including the fan feature in particular, which satisfies even Petitioner's definition of approval.

(a) Other circuits have found sufficient government approval under similar facts. Indeed, meaningful review and participation has been the standard in virtually every circuit decision construing "government approval" under *Boyle*. For example, in *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1320 (11th Cir. 1989), *cert. denied*, 108 L.Ed.2d 615 (1990), sufficient government approval was found where the contractor's designs were

"evaluated" and given "extensive review" by the government. Similarly, in *Kleeman v. McDonald-Douglas Corp.*, 890 F.2d 698, 701 (4th Cir. 1989), *cert. denied*, 109 L.Ed.2d 545 (1990), *Boyle's* first element was satisfied where "teams of Navy engineers met with each contractor for extended discussions," evidencing that the "government was a substantial participant."

In *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946, 948 n.4 (4th Cir. 1989), the "Navy reviewed . . . tested [and] scrutinized a mock-up" which "demonstrated Navy participation in design that amounts to more than rubber stamping." The Fourth Circuit's *Boyle* decision found that "back-and-forth discussions" are the "type of exchange of information [that] will normally suffice to establish governmental approval of the design in question," especially where the "Navy reviewed the mock-up and approved the design." *Boyle v. United Technologies Corp.*, 792 F.2d 413, 414 (4th Cir. 1986), *vacated and remanded*, 487 U.S. 500, 514 (1988).

Each of these cases detail an approval process involving government review of specifications, drawings and prototypes virtually identical to that of the Respondent and the Army. For instance, the Army provided Respondent Fairchild with initial procurement specifications of the VEA4-3A, and required Respondent to refine these initial specifications into detailed design drawings. (R.I, p. 111; R.II, Buckingham Depo., pp. 9, 11-14). Respondent, over time, prepared (1) an initial engineering analysis, then (2) preliminary design layout drawings, and finally (3) detailed design drawings. (R.I, p. 113-14; R.II, Buckingham Depo., p. 15). The detailed drawings included Specification 699, which is a highly detailed, 35

page document solely dedicated to detailing the VEA4-3A fan design. (R.I, pp. 55, 57-91). Each refinement was submitted to the Army for review, evaluation and approval before the next level of refinement could be made, and each refinement was subject to any changes desired by the Army. (R.I, pp. 113-15; R.II, Buckingham Depo., p. 15).

A similar process is described in *Ramey*, 874 F.2d at 948 n.4, where initial government specifications were refined by a contractor, which were then reviewed and approved by the military. Fairchild's detailed design drawings, including the fan's Specification 699, were subjected to a critical design review conference similar to that described in *Harduvel*, 878 F.2d at 1320. This conference lasted several days, during which every component of the VEA4-3A was reviewed by Army engineers, and changes to the design were made by the Army. (R.I, pp. 55-56, 113-14; R.II, Buckingham Depo. pp. 15-16).

The VEA4-3A design process reflects the sort of "continuous back and forth" discussions between the contractor and government that constituted government approval in *Boyle*, 792 F.2d at 414, and *Harduvel*, 865 F.2d at 1480. Respondent exchanged every detail of information with the Army, and Army engineers provided their input in the design review conferences. (R.I, pp. 113-15). Through continual review of each stage of Fairchild's work, the Army supervised and controlled the VEA4-3A's design.

After the detailed design drawings had been reviewed and approved, the Army "froze" the design, and Respondent was required to build preproduction

prototype models without deviation from the approved design. (R.I, p. 114; R.II, pp. 15-16). The prototypes underwent extensive testing for several months by the Army, independent testing facilities and Respondent. Every aspect of the VEA4-3A design was analyzed and evaluated by the Army during that time. (R.I., pp. 55-56, 114; R.II, Buckingham Depo., pp. 33-34).

The Army then spent approximately another month reviewing and evaluating the test results. (R.I., p. 114). Similar to *Kleeman*, 890 F.2d at 701, and *Ramey*, 874 F.2d at 948, n.4, the testing procedures, nature of the tests, and the criteria for acceptance of the VEA4-3A were all controlled and dictated by the Army, which held the absolute right to reject or modify the design at any point in its development. (R.I., p. 114-15). Prototypes were also tested by the military in *Ramey*, 890 F.2d at 948, and in *Boyle*, 792 F.2d at 414-15, which those courts found "adequately demonstrated that the Navy approved reasonably detailed specifications."

It is difficult to conceive of a more thorough means of review than months of testing, or a more "precise specification" than a working prototype. Indeed, the same type of facts set out above were found sufficient to establish government approval in *Kleeman*, *Harduvel*, *Ramey* and *Boyle*, since "[i]t is the salient fact of *governmental participation* in the various stages of the [equipment's] development that establishes the military contractor defense. Indeed, *active governmental oversight* is relevant to all three elements of defendant's burden." *Kleeman*, 890 F.2d at 701 (emphasis added).

Boyle held that the government must "consider" the design choices made by the contractor. *Boyle*, 487 U.S. at 512. However, the government need not be the designer itself,[2] because "the design ultimately selected may well reflect a significant policy judgment by government officials whether or not the contractor rather than those [government] officials develop the design." *Boyle*, 487 U.S. at 513. The standard of active government review, participation and oversight established by *Kleeman*, *Harduvel*, *Ramey*, *Boyle*, and now *Stout*, is consistent with *Boyle*'s approval requirement and assures that the government has considered the design choices involved.

(b) Stout is factually distinguishable from Trevino. Petitioner's reliance on the "rubber stamp" language in *Trevino* is misplaced, since *Stout* is factually distinct from *Trevino*. The evidence in *Trevino* established that (1) the contractor did not comply with Navy specifications, and (2) the Navy did not conduct *any* review of the contractor's design at any point. *Trevino*, 865 F.2d 1474, 1480, 1486-87. As a result, the *Trevino* court held that the Navy official's signature of approval was merely a "rubber stamp" insufficient to constitute approval under *Boyle*. *Id.*

Trevino therefore articulates the extreme at which government *acceptance* does not satisfy the requirement of government *approval*. The *Trevino* court specifically noted

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[2] Petitioner mistakenly attaches significance to the notion that "the contractor, not the military, was wholly responsible for designing the unit." Petition, p. 5. *Boyle* requires review and approval, not that the military actually originate the design that is ultimately approved.

that "[i]t must be emphasized that the *absence of review* is critical in this case." *Trevino*, 856 F.2d at 1487, n.13 (emphasis added). Where there is review, there is an exercise of discretion. There is only the absence of discretion when the government "merely accept[s]" the contractor's work. *Trevino* never held, as Petitioner alleges, that "mere review" is insufficient. *Id.* at 1485.

Petitioner further misreads *Trevino* by arguing that it requires a specific, separate showing of the exercise of government discretion to satisfy *Boyle*'s first element. Petition, p. 8. Petitioner's "*Trevino* rule" has the effect of adding an unnecessary fourth element to the *Boyle* three-part test, since the fulfillment of the first two elements *is* the showing of governmental discretion. "The first two of these [elements] assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated – i.e., they assure that the design feature in question was considered by a government officer, and not merely by the contractor itself." *Boyle*, 487 U.S. at 512. There is no precedent in *Trevino* or elsewhere for Petitioner's requirement of a separate showing of discretion.

(c) The Army had extensive input in the design, and excluded Stout's suggested protective devise. Petitioner misstates the record by claiming (1) "nothing indicates . . . any modification or other input to the unit's design" by the Army, and (2) "the Army made no decision as to whether to include or exclude a safety device on the unit's fan."

First, the extensive input of the Army in the design process has already been described. (R.II, Buckingham Depo., pp. 15-16). Furthermore, the record establishes

that the design of the VEA4-3A fan that injured Stout was identical to the fan in the VEA4-3, which had been developed and used by the Army for ten years before the development of the VEA4-3A. (R.I, pp. 55, 115; R.II, Buckingham Depo., pp. 18-20, 41-43).

Respondent was given the task of redesigning the Army's VEA4-3. The preceding model's design therefore dictated much of the VEA4-3A design, leaving Respondent little discretion. (R.I, p. 113; R.II, Buckingham Depo., p. 18-20). Even the VEA4-3A itself was not substantially divergent from the VEA4-3, reinforcing the conclusion that the design was ultimately the Army's from the very start. (R.II, Buckingham Depo., pp. 19-20). Thus, the Army had substantial input in the unit's design.

Second, the Army did specifically decline to include the very safety device suggested by Petitioner. Indeed, after Petitioner sustained his injury, Chief Warrant Officer Allen Blietz, one of Petitioner's superiors, submitted a proposal to the Army Corps of Engineers at Fort Belvoir[3] for permission to install a safety screen next to the fan "so if anybody had to work inside with the turbine going, there was no possible way of getting any injuries from the turbine . . . but on the form I received back, they [the Army] said it wasn't feasible . . . and it would not be a necessary requirement." (R.II, Blietz Depo., pp. 20-21).

The Army therefore exercised a discretionary function by balancing "technical, military and even social considerations, including specifically the trade off

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[3] Petitioner was originally trained to service units similar to the VEA4-3A at Fort Belvoir. (R.II, Stout Depo., pp. 13-17).

between greater safety and greater combat effectiveness," in rejecting the protective safety screen as unfeasible and unnecessary. *Boyle*, 487 U.S. at 512. Robert Buckingham, one of the designers of the VEA4-3A, concluded that a protective screen such as the one suggested would not be feasible because "any close off of the inlet area of the fan would grossly affect the hot day design point performance of the air conditioning by restricting the air flow [such that] [i]t would make it inoperative on hot day conditions", such as where the outside temperature reached 125° Fahrenheit. (R.II, Buckingham Depo, pp. 46-47).

Since it was required that the VEA4-3A air conditioner be able to maintain stable atmospheric conditions within the Hawk missile repair shelter even under such extreme external weather, no protective screen was included in the design. The absence of such a screen was obvious to anyone reviewing the VEA4-3A's detailed drawings or the prototype, both of which were scrutinized by the Army. (R.II, Buckingham Depo., p. 17). To impose liability on Respondent for the Army's discretionary judgment that a protective screen would sacrifice military priorities in terms of the performance parameters required of the Hawk repair shelter, would be the very sort of "second guessing" that the government contractor defense is designed to prohibit. *Boyle*, 487 U.S. at 511.

The Army did not passively accept whatever design Fairchild developed. The record does not support Petitioner's comparison of *Stout*'s facts to those in *Trevino*. The Fifth Circuit followed *Boyle* and *Trevino* in specifically requiring a showing of meaningful, "substantive review

and evaluation" of the design, rather than mere acceptance to satisfy *Boyle*'s first element. *See Stout*, 933 F.2d at 335-36. There is no conflict between *Stout* and *Boyle* or *Trevino*, nor is there error necessitating further review.

2. The Survivability of a Failure to Warn Claim is not Raised by the *Stout* Decision.

In his second argument, Petitioner purports to show conflict between the *Stout* opinion's second footnote and the Second Circuit's opinion in *In re Joint Eastern & Southern District New York Asbestos Litigation*, 897 F.2d 626, 630-31 (2d Cir. 1990). Petitioner cites the *In re Asbestos Litigation* case for the proposition that a "failure to warn claim would be viable even in a situation precluding a design defect claim." Petition, p. 13. Petitioner contends *Stout*'s second footnote "implies" the contrary. Petitioner did not previously argue this point in the courts below, and thus it was not preserved for further appeal, nor was it considered by the Fifth Circuit. Further, there is no conflict even between the "implication" of the *Stout* opinion's footnote dictum and the Second Circuit's *In re: Asbestos Litigation* decision.

(a) Boyle applies to failure to warn claims. A claim alleging the absence of adequate warnings is equally susceptible to the government contractor defense as a defective design claim. *Garner v. Santoro*, 865 F.2d 629, 635 (5th Cir. 1989); *Bynum v. FMC Corp.*, 770 F.2d 556, 574 n.4 (5th Cir. 1985). *In re Asbestos Litigation* is not to the contrary. The Second Circuit merely observed that the government contractor defense would not displace state tort warning law where the government exercised *no*

control and placed *no* requirements on the contractor in regard to warning labels. 897 F.2d at 631.

The *In re Asbestos Litigation* decision even cited favorably *Nicholson v. United Technologies Corp.*, 697 F. Supp. 598 (D. Conn. 1988), and explained that "the scope of Governmental control over the content of the repair manual in *Nicholson* supported the conclusion that the Government's specifications left no room for any addition [of warnings] by the manufacturer." *Id.* at 633, *citing Nicholson*, 697 F. Supp. at 604. The Second Circuit therefore approved of the application of the *Boyle* defense to displace a failure to warn claim pertaining to a military technical manual where the government exercised sufficient control overall. *Id.*

Stout is analogous to the facts in Nicholson, as Respondent was under strict limitations as to the content of the technical manuals, as dictated by the Army's detailed manual guidelines and contract. Petitioner mischaracterizes the record with his statement that "Fairchild was given *carte blanche* in drafting the technical manual." Petition, p. 5. The format of the manual, its organization, content, layout, subjects to be covered, specifications regarding any photographs, drawings or schematic diagrams, page size and other details were all controlled by detailed military specifications established by the Army pursuant to the separate technical manual contract. (R.I, p. 114).

The *In re Asbestos Litigation* decision remanded the question of *Boyle*'s applicability to the warning claim only because there was insufficient evidence of government control over the labeling of the asbestos cement packages.

By contrast, the evidence in *Stout* established the Army's involvement and control over the contents of the manual. For example, it was Buckingham's recollection that the Army reviewed the technical manual and made changes prior to approval. (R.II, Buckingham Depo., pp. 21-22).

After Fairchild fulfilled its obligation to supply a technical manual, the Army made further revisions on a routine basis. By 1970 the Army entirely replaced the manual prepared by Respondent. (R.II, Blietz Depo., p. 19, 24-25). It was the 1970 Army revised VEA4-3A manual that was available to Stout at the time of his injury, not the manual originally prepared by Respondent. (R.II, Blietz Depo., p. 37-38).

(b) Survival of a Warning Claim not Preserved for Appeal. Petitioner did not at any time assert a warning claim distinct from the design claim in the courts below. Nor did Petitioner argue that a failure to warn claim could survive the application of the government contractor defense where a defective design claim could not.

Petitioner's only arguments raising the warnings issue were limited to establishing that Respondent did not meet his summary judgment burden on the third *Boyle* element. For example, at page 13 of his Fifth Circuit appellant's brief, *In re Asbestos Litigation* is cited for the proposition that Fairchild must prove the government imposed specific warning requirements that conflicted with state law in order for *Boyle* to apply. From there, Petitioner argued that Respondent did not make such a showing of warning requirements, and "[f]or this reason, Fairchild did not meet *Boyle*'s third prong as a matter of

law, and summary judgment was improperly entered." Appellant's Brief, p. 15.

At no point in his appellant's brief did Stout contend that a failure to warn claim should survive if the defective design claim did not, nor did his brief even suggest that the failure to warn claim should be considered a separate claim apart from the defective design claim.[4] Accordingly, the Fifth Circuit's second footnote in *Stout*, which Petitioner now argues is in conflict with *Boyle* and *In re Asbestos Litigation*, refers to "this potential issue" as "unclear" in Stout's brief, and merely observes that "he does not contend that his failure to warn claim can survive the government contractor defense if his design claim does not." *Stout*, 933 F.2d at 337, n.2.

The Fifth Circuit similarly noted that Stout cited the *In re Asbestos Litigation* case "only to support his argument that Fairchild's summary judgment evidence did not meet *Boyle*'s third prong as a matter of law." *Id*. The Fifth Circuit properly did not address the issue, since it was not raised by Stout on appeal or at the district court. As a consequence, the footnote is dictum.

By approving *Nicholson*, the Second Circuit recognized that *Boyle* can preempt both design and warning claims. Since Petitioner has not previously suggested that

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[4] The Appellee's Brief filed by Fairchild asserted that "like the plaintiff in *Nicholson*, Stout asserts a failure to provide adequate warnings . . . but not any independent duty to warn * * * [and he] did not treat the inadequacy of warnings allegation as separate from the design defect allegation in his summary judgment briefs before the district court." Appellee's Brief, p. 16 and n.3. Stout never disputed this assertion.

his warning allegations are distinct from his design claim, and since his previous warning arguments were limited to opposing Respondent's proof of *Boyle's* third element, the survival of a warning claim is not implicated by the *Stout* decision. There can therefore be no conflict between the circuits on this issue, which was not preserved for review in any event.

(c) Open and Obvious Dangers Gave Army Knowledge Regardless of Warnings. Contrary to the last portion of Petitioner's second argument, there was no error or misstatement of Texas law by the Fifth Circuit when it stated "there is no duty to warn when the danger is obvious or actually known to the injured person." *Id.* Petitioner contends this legal precept does not apply to the *Boyle* doctrine because the duty to warn "extends to the government, while state tort law might apply to the individual." Petition, p. 13. However, if a danger is open and obvious to persons in general, then it would be obvious to the government as well, and the government should be charged with knowledge. This is significant because if the Army knew of the VEA4-3A fan's dangers, a warning by Respondent under *Boyle* would be unnecessary.

Several circuits have charged the military with knowledge of dangers where it has had considerable experience and opportunity to notice a danger which is readily apparent. For example, the *Trevino* court held that "because both the Navy and General Dynamics could see that the final design included no safety devices, liability of General Dynamics could not be based upon non-disclosure of these dangers." *Trevino*, 865 F.2d at 1487. *See also, e.g., Boyle*, 792 F.2d at 414-15 (Navy awareness of

dangers presumed after approval of mockup and subsequent operational use for 13 years); and *Ramey*, 874 F.2d at 950 ("length and breadth of the [military's] experience with the component – and its decision to continue using it – amply establish government approval of the alleged design defects"), *citing Dowd v. Textron, Inc.*, 792 F.2d 409 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988).

The Army had actual knowledge of the danger of personal injury from contact with the VEA4-3A's moving parts prior to its sale to the Army. The Army had years of experience with the older VEA4-3, which had an unscreened fan design and location virtually identical to the VEA4-3A's. The Army even required the VEA4-3A fans to be interchangeable with those in the VEA4-3. *Stout*, 933 F.2d at 335; (R.I, pp. 55, 115; R.II, Buckingham Depo., pp. 19-20, 41). Finally, the Fifth Circuit noted that the VEA4-3 manual's warning of the dangers of moving parts also established the Army's knowledge of the dangers posed by the fan, which was one of the VEA4-3A's only two moving parts. *Id.* at 336-37; (R.I, p. 56).

The Army thoroughly inspected, reviewed, tested and evaluated the design drawings and the working preproduction prototypes of the VEA4-3A. (R.I, pp. 55-56, 115). As a consequence, the Army had knowledge of the tremendous power and suction of the fan, and the obvious risk of personal injury to anyone near the fan when the VEA4-3A's side panels were removed. Indeed, this open and obvious danger was evident to anyone who observed the noisy and powerful operation of the VEA4-3A condenser fan, which would "shoot like a gun" any object placed on the fan outlet. (R.II, Blietz Depo., pp.

23-24; R.II, Stout Depo., p. 83; R.II, Buckingham Depo., p. 31).

Petitioner argues that the Fifth Circuit erred by finding the fan an open and obvious danger because "this conclusion . . . ignores the well-known nature of moving blades . . . they are invisible." Petition, p. 15. If this "highly treacherous nature" of moving blades is "well-known" as Petitioner argues, then it still must be an open and obvious danger. Furthermore, a danger can be open and obvious even where it may be invisible to the naked eye. For example, a danger that is loud and can be sensed due to its extreme power can be "open and obvious."

Chief Blietz agreed that the fan made "a heck of a lot of noise" and "was not only loud, but it was *obviously* functioning under substantial power." (R.II, Blietz Depo; pp. 23-24) (emphasis added). Stout himself agreed that "the suction [was] so great [that] it would cause the hair on your head to pick up," and that prior to the accident, he knew that his hand would be injured if he "got caught up in the fan." (R.II, Stout Depo., pp. 83, 92).

There was no error in the Fifth Circuit's factual conclusion regarding the Army's knowledge. Petitioner's second argument that *Stout* "erroneously applied Texas tort law" is not the proper subject for the granting of a writ of certiorari, even assuming there was error. Nor are the "implication[s]" of *Stout's* footnote two, which is dictum.

3. Stout and the Army had Direct Knowledge of Danger, thus Respondent had no Duty to Warn.

Petitioner's third argument articulates no conflict between *Stout* and the *Boyle* doctrine. Instead, it only presents Petitioner's disagreement with the decisions by the courts below that *Boyle's* third element was proven as a matter of law. First, Petitioner points to his testimony that he had been trained to troubleshoot air conditioners by removing the side panels and running his hand along the copper refrigerant pipes while the unit was operating ("manual diagnosis"). Petitioner then asks the Court to leap to the conclusion that the Army must not have been aware of such dangers, as otherwise it would not have trained Stout to use such a dangerous procedure.[5] Petition, p. 14.

Such a conjectural inference does not rise to the level of competent summary judgment evidence that could controvert Respondent's evidence. Petitioner is only entitled to the benefit of those inferences which "the record as a whole" would "lead a rational trier of fact to find." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Such an inference is both unreasonable and unsupported by the actual record.

While Stout claims he was trained at Fort Belvoir to perform the manual diagnostic procedure, the evidence reflects that the procedure was only taught as appropriate

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[5] The Army's investigation of this incident concluded that Stout's own negligence caused the accident, an unlikely conclusion if his manual diagnosis method was the approved technique. (R.II, Blitz Depo., pp. 15-16 and Ex. 1).

for *horizontal* 38,000 BTU air conditioning units, and not for *vertical* 38,000 BTU air conditioner units such as the VEA4-3A. (R.II, Stout Depo., pp. 15-17, 26-31). The fan design and operation differs greatly between horizontal and vertical units (R.I, Stout Depo., pp. 16, 23), and Petitioner was never trained to perform the manual diagnosis method on a VEA4-3A during his training at Fort Belvoir or during his Army career at Schweinfurt, Germany and Fort Bliss. (R.II, Stout Depo., pp. 31, 52, 62).

Stout was warned by his Army instructor at Fort Belvoir to not get his hand caught in the fan when doing maintenance on 38,000 BTU air conditioners while they were operating, and he admits that he knew the VEA4-3A's fan posed such a danger. (R.II, Stout Depo., pp. 53, 83). Petitioner now dismisses his instructor's warning as merely a "general instruction," (Petition, p. 15), yet it was precisely Stout's failure to heed this warning that resulted in his injury.

Both courts below found persuasive Petitioner's admission that he knew the fan was dangerous and that he could be injured by it. *Stout*, 933 F.2d at 337; (R.I., Memorandum Opinion, p. 24). The Fifth Circuit noted that Stout's admission that his instructor warned him about the dangers posed by the fan demonstrated "the Army's undisputed knowledge of the risks involved in repairing the unit in [that] manner." *Id.* Petitioner neglects to explain how this conclusion is in error. Further, the Fifth Circuit noted that "the Army must be charged with knowledge of the obvious risk that the exposed fan posed . . . " because "[t]he unit was so powerful that it would propel any object placed on the fan outlet like a shell from a cannon." *Id.* If the Army had

knowledge, then the *Boyle* defense applies whether Stout knew or not.

Petitioner misstates the record by asserting that "Buckingham acknowledged that he knew precisely the risk involved in the strong fan pulling a repair person's hand or arm into the blades." Petition, p. 5. Petitioner suggests that Fairchild was aware of the manual diagnosis method and its dangers, but failed to warn the Army. However, Fairchild was not aware, and Buckingham never so testified.

Instead, Buckingham stated there was no productive reason for Stout's method of searching for "clogs" in the system, and testified that "you certainly wouldn't find it [the clog] by putting your hands in there and feeling anything." (R.II, Buckingham Depo., pp. 38-40). Buckingham merely stated that Stout's repair procedure was improper, extremely dangerous and contrary to the warnings given by Fairchild's technical manual. (R.II, Buckingham Depo., pp. 38-40). He never testified that he knew of Stout's manual repair method at the time the manual was written, or even before this lawsuit was brought.

It is also undisputed that Respondent had no involvement in the training of air conditioning technicians, nor in recommending the specific procedures to be used to maintain the units other than that found in the technical manuals. (R.I, pp. 114-15). The manual does prescribe a safe method of checking for coolant clogs, which excludes Stout's method. (R.II, Buckingham Depo., pp. 37-40).

Petitioner also takes exception to the Fifth Circuit's conclusion that the warnings in the VEA4-3 and VEA4-3A

technical manuals adequately put the Army and/or Stout on notice of the fan's dangers. Petition, p. 15. Petitioner misstates the record by contending that the "only warning . . . went to the danger of electric shock . . . [which] the government never interpreted [as] . . . a warning of . . . its moving fan." Petition, P. 5. The VEA4-3's technical manual specifically warned to "[a]lways operate the air conditioner with all panels tightly secured to prevent personal contact with electrical components *or moving parts.*" (R.I, Memorandum Opinion, pp. 23, 24; R.I, pp. 56, 97-99, 115; Buckingham Depo., pp. 49, 50) (emphasis added). Thus, the government had to know of the danger posed by the moving fan.

Similarly, the VEA4-3A's technical manual warns that "Before removing or installing any panel assembly, disconnect the power source from the air conditioner." (R.I, pp. 55, 56, ~~115~~; R.II, Buckingham Depo., pp. 11-13, 28-29). This warning prohibits the manual diagnosis method which Petitioner used, since he placed his hand inside the unit after the panels had been removed, with the power connected and the fan running.

Even assuming Petitioner raised a failure to warn claim, the uncontroverted summary judgment evidence established as a matter of law that both Stout and the Army had ample warning and knowledge of the fan's danger. There are no fact questions raised by the record, nor does the *Stout* opinion conflict with *Boyle* in its finding that the undisputed facts established *Boyle's* third element. Petitioner's arguments are factually oriented and present no question of law suitable for this Court's review.

CONCLUSION

Petitioner's arguments present contentions limited to the factual findings by the courts below, from what was a virtually uncontroverted summary judgment record. No question of law is at issue in this case that justifies the grant of a writ of certiorari. Petitioner has failed to sustain his burden of establishing that there are special and important reasons for the granting of a writ of certiorari, and his Petition should be denied.

Respectfully submitted,

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